Supreme Court, U. S.
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80-432

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF NEWARK, a municipal corporation, CITY OF ELIZABETH, a municipal corporation, ESTHER G. BERTONI, LOUELLA DeVITA, LOIS BERTONI, LOUIS B. BERTONI; ESTHER G. BERTONI, STEPHEN DUDIAK and ESTELLE SMITH, Trustees under the Last Will and Testament of LOUIS P. BERTONI for the Benefit of LOUELLA DeVITA, LOUIS B. BERTONI and LOIS BERTONI; MARION BOSCIA; THE ESTATE OF DAVID COLEMAN; VINCENT P. MAZZOLA; SARA TACCETTA; ANTHONY TACCETTA, JR., BARBARA TACCETTA SANTANGELO and FRANK STAMATO, partners trading as C & S DEVELOPMENT COMPANY; NEW JERSEY LAND TITLE INSURANCE ASSOCIATION, a New Jersey corporation,

Petitioners,

vs.

NATURAL RESOURCE COUNCIL IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the tideland agent of the State of New Jersey; NAVIGATION BUREAU OF THE DIVISION OF MARINE SERVICES IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the agent designated by N.J.S.A. 13:1B-13.2 for the performance of title studies and surveys of the meadowlands throughout the State of New Jersey; WILLIAM T. CAHILL, Governor of New Jersey, GEORGE F. KUGLER, JR., Attorney General, ROBERT J. FALCEY, Acting Secretary of State, WALTER WECHSLER, State Comptroller, WILLIAM E. MARFUGGI, State Treasurer, and EDWARD KILPATRICK, Acting Commissioner of Education, as the Trustees for the Support of Public Schools designated by N.J.S.A. 18A:56-1; and THE STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May New Jersey assert sovereign ownership to vast areas of non-navigable interior meadowlands or does the constitutional sovereignty of the states limit those claims to the beds of public navigable waterways within New Jersey's boundaries?

2. Does New Jersey's retroactive expansion of its sovereign ownership claims into vast areas of non-navigable interior meadowlands which have been the subject of private ownership for 300 years constitute the taking of private property without just compensation in violation of the Due Process Clause of the Fourteenth Amendment?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980 No.

CITY OF NEWARK, a municipal corporation, CITY OF ELIZABETH, a municipal corporation, ESTHER G. BERTONI, LOUELLA DEVITA, LOIS BERTONI, LOUIS B. BERTONI; ESTHER G. BERTONI, STEPHEN DUDIAK and ESTELLE SMITH, Trustees under the Last Will and Testament of LOUIS P. BERTONI for the Benefit of LOUELLA DEVITA, LOUIS B. BERTONI and LOIS BERTONI; MARION BOSCIA; THE ESTATE OF DAVID COLEMAN; VINCENT P. MAZZOLA; SARA TACCETTA; ANTHONY TACCETTA, JR., BARBARA TACCETA SANTANGELO and FRANK STAMATO, partners trading as C & S DEVELOPMENT COMPANY; NEW JERSEY LAND TITLE INSURANCE ASSOCIATION, a New Jersey corporation,

Petitioners,

vs.

NATURAL RESOURCE COUNCIL IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the tideland agent of the State of New Jersey; NAVIGATION BUREAU OF THE DIVISION OF MARINE SERVICES IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, as the agent designated by *N.J.S.A.* 13:1B-13.2 for the performance of title studies and surveys of the meadowlands throughout the State of New Jersey; WILLIAM T. CAHILL, Governor of New Jersey, GEORGE F. KUGLER, JR., Attorney General, ROBERT J. FALCEY, Acting Secretary of State, WALTER WECHSLER, State Comptroller, WILLIAM E. MARFUGGI, State Treasurer, and EDWARD KILPATRICK, Acting Commissioner of Education, as the Trustees for the Support of Public Schools designated by *N.J.S.A.* 18A:56-1, and THE STATE OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

OPINION BELOW

The opinion of the New Jersey Supreme Court is reported at 82 N.J. 530, – A.2d – (1980). A copy of that opinion appears in the appendix hereto at A2.

JURISDICTION

The opinion and judgment of the New Jersey Supreme Court was entered on May 15, 1980. A timely petition for rehearing was filed. The order denying the petition for rehearing (but modifying the Court's opinion) was entered on June 24, 1980 (A1). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

New Jersey Statutes Annotated, Title 13, Chapter 1B:

Section 13.1 Definitions

As used in sections 86 through 102, inclusive, of this act.

(a) "Meadowlands" means those lands, now or formerly consisting chiefly of salt water swamps, meadows, or marshes;

(b) "Improved meadowlands" means such meadowlands as have been reclaimed by fill or other material thereon, and may include the erection of structure.

(c) "Virgin meadowlands" means such meadowlands that are still in their natural state and upon which no diking, fill or structures have been placed.

(d) "Council" means the Resource Development Council of the Department of Conservation and Economic Development.

Section 13.2 Title studies and surveys; certification of state owned lands

The council is hereby directed to undertake title studies and surveys of meadowlands throughout the State and to determine and certify those lands which it finds are State owned lands.

In undertaking its studies and surveys the council shall divide its work into such a number of surveys as it shall determine is advisable and it shall establish the priority in which such surveys shall be undertaken. As its first survey, and within 6 months of the effective date of this act, the council shall undertake, and complete, a study of the Hackensack Meadowlands. During the period of time between the initiation of a project and the publication of the map and study delineating the State-owned lands within the survey area, the council shall make no conveyances, leases, or transfers of any riparian land within the survey area.

These studies and surveys shall be performed on behalf of the council by the Navigation Bureau of the Department of Conservation and Economic Development.

Section 13.4 Publication of map; filing; distribution

Upon completion of each separate study and survey, the council shall publish a map portraying the results of its study and clearly indicating those lands designated by the council as State-owned lands. Copies of each such map and study shall be filed with the Secretary of State and sent to the clerk of each county and to the governing

body of each municipality whose political boundaries include lands shown on the map. Such maps and studies shall be available for public inspection.

The council shall also cause to be published at least once in a newspaper circulating in each county whose political boundaries include lands designated as State-owned lands a list of those parcels designated in whole or in part as State-owned lands.

STATEMENT OF THE CASE

In *O'Neill v. State Highway Department*, 50 N.J. 307, 235 A.2d 1 (1967), New Jersey's highest court for the first time clearly abandoned "navigability" as the basis of sovereign ownership. Instead, it applied a "tidal ebb and flow" test exclusively to extend New Jersey's sovereign ownership claims into vast areas of non-navigable interior meadowlands, meadowlands which have historically been the subject of private ownership. The Court recognized the far-reaching practical impact of its decision, and suggested that "[a]s a matter of good housekeeping" the "appropriate officers of the State should do what is feasible to catalogue the State's far-flung holdings." Id., at 320.

The New Jersey Legislature responded by enacting *N.J.S.A.* 13:1B-13.1 *et seq.* (effective January 13, 1969). This statute directed the appropriate State agency to "undertake title studies and surveys of meadowlands throughout the State and to determine and certify those lands which it finds are State-owned lands." *N.J.S.A.* 13:1B-13.2.

The first attempt by the State at compliance with *N.J.S.A.* 13:1B-13.1 *et seq.* resulted in the publication on January 14, 1970 of a two-part map known as the "Block

and Lot Subdivision in the Hackensack Meadows" (Ex. A-90, 91).[1] On this map the State asserted fee simple ownership to approximately one-half of the 23,000-acre Hackensack Meadowlands, including a State claim of ownership to virtually the entire Town of Kearny with a population in the 1970 federal decennial census of 37,262. This two-part map was suppressed for evidentiary purposes on September 8, 1971 in *State of New Jersey, by the Commissioner of Transportation v. The Council in the Division of Resource Development of the State of New Jersey*, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-12561-68. The basis for suppression was the failure of the State to comply with the mapping criteria of *N.J.S.A.* 13:1B-13.3 (A30-A31).

The second attempt by the State at compliance with *N.J.S.A.* 13:1B-13.1 *et seq.* produced 36 claim maps of the Hackensack Meadows and a claim map for the Newark/Elizabeth Meadows that were published at various times in 1973 and 1974 (Ex. R-1 to 120). These maps were challenged in this action in the New Jersey court system. The somewhat unusual procedural background of this action is set forth in the pretrial order and trial court opinion (A61; A25).

The claim maps under attack represent a statutory determination and certification by the State under *N.J.S.A.* 13:1B-13.2 that thousands of acres of non-navigable meadows, in private record ownership, are in fact state-owned (Tr. XI-13; Ex. R-1 to 120; R-240; A-173 to 175; A-189; A-201 and 202; A-205 and 206; A-220 and A-299). In some instances, the State has determined and certified that it

1. Throughout this petition, the references to exhibit numbers are to the trial record. Transcript references to the trial record indicate the transcript volume and page.

owns non-navigable interior meadowlands in a continuous irregular band extending inland two miles and more from the navigable portions of the nearest waterway (see, e.g., Ex. R-8; R-9; R-10; R-14; R-15; R-19; R-44; R-45; R-46; R-50; R-51 and R-55). The trial court pointed out the "self-evident and dramatic" impact of these State claim maps prepared solely on the basis of the "tidal ebb and flow" test, without regard to navigability (A30), and it noted that the difference in the application of "federal common law" or "New Jersey common law" to the extent of sovereign ownership was "dramatic and far-reaching in consequence" (A32).

Petitioners here challenged the validity of the maps in the proceedings below on both state and federal grounds. The federal questions presented in this petition were raised at all levels below and either rejected or not addressed by the New Jersey courts. Because there were no pleadings in usual form in this matter, petitioners have included in their appendix the pretrial order entered by the trial court and the table of contents from briefs filed below to demonstrate that the questions presented here were in fact fully raised before the New Jersey courts at all levels (A61; A82).

Petitioners fall into three classes: (1) The cities of Newark and Elizabeth are municipal corporations which, in order to raise revenue for the support of local government, have historically assessed and taxed to private owners the property now claimed to be state-owned. (2) The individual petitioners, Esther G. Bertoni, *et al.*, are record owners of real property in the Hackensack Meadows. Their land is heavily vegetated meadows, land not "navigable" in any sense of the word (Ex. R-1 to 36). Their record chains of title extend back to colonial times (Ex.

A-220). Substantial portions of their holdings, however, have been "determined and certified to be State owned" as a result of the publication of the maps under attack. (3) Finally, the New Jersey Land Title Insurance Association is a trade association of title insurers, whose members have searched and insured as privately-owned substantial tracts of land now claimed by the State (Tr. X1-13 to 24).

ARGUMENT

Introduction

Petitioners submit that the two questions presented for review are important federal questions which should be settled by this Court. Although this Court, on occasion, has addressed the nature and extent of sovereign ownership of lands under water, this issue has usually arisen in the context of a state admitted to the Union under the Equal Footing Doctrine. The application of the Equal Footing Doctrine in these specific cases compelled this Court as a matter of federal constitutional law to first define the parameters of sovereign ownership of lands under water in the 13 original states, and this definition was formulated with reference to the navigable character of the waterway. New Jersey, through both judicial pronouncements and legislative action, has now departed significantly from this long and well-established federal definition and has retroactively asserted its title to vast areas of non-navigable interior meadowlands which have been in private record ownership for 300 years. Recently New Jersey has been encouraged in its effort to expand its ownership by this Court's opinion in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363 (1977). As petitioners' argument below indicates, the New Jersey Supreme Court opinion is based upon an erroneous reading of both English common law and United States Supreme Court cases on this subject. In addition, the sudden and unpredictable change in New Jersey law accomplished by court decision and implemented by statute constitutes the taking of private property without just compensation. These are both extremely important questions of significance not only to New Jersey but to all of the coastal states, and they should now be addressed by this Court.

Point I

The purpose underlying sovereign ownership of waterways is the protection of public rights of navigation and commerce from private interruption and encroachment.

In *Martin v. The Lessee of Waddell,* 41 U.S. 367 (1842), a case which involved land under water in Raritan Bay in Perth Amboy, New Jersey, the Court described in these terms the sovereign rights which the 13 original states acquired in their waterways at the time of the American Revolution:

> "For when the Revolution took place the people of each State became themselves sovereign; and in that character *hold the absolute right to all their navigable waters and the soils under them for their own common use,* subject only to the rights since surrendered by the Constitution to the general government." 41 U.S. at 410 (emphasis added).

The states have surrendered to the federal government the power to regulate commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S. Constitution, Art. 1, §8. The Constitution thereby created a navigational servitude in favor of the federal government under which navigable waters are under the control of the United States for the purpose of regulating and improving navigation. *Gibson v. United States,* 166 U.S. 269, 271-272 (1897). Navigable waters and the soils under them were not granted by the Constitution to the United States but were reserved to the states respectively, and the states which joined the Union after the 13 original states have the same rights, sovereignty, and jurisdiction over their navigable waters and the soils under them as do

the original states. *Pollard's Lessee v. Hagan,* 3 Howard 212 (1845). Thus, the Court states in *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra:*

> "Pollard's Lessee held that under the equal-footing doctrine new States, upon their admission to the Union, *acquired title to the lands underlying navigable waters within their boundaries.*" 429 U.S. at 370 (emphasis added).

The Court in *Illinois Central Railroad Company v. Illinois,* 146 U.S. 387 (1892), a case which dealt with the dominion and sovereignty of the land under water along the Chicago lakefront, stated that the common law doctrine "of dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable . . ." 146 U.S. at 436. Mr. Justice Field explains the purpose underlying sovereign ownership of land in these words:

> "The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which would alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. *The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment,* a reason as applicable to navigable fresh waters as to waters moved by the tide" 146 U.S. at 436 (emphasis added).

Placing ownership of navigable waters and the soils under them in the sovereign assures protection of the public rights

therein. As was said in *Barney v. Keokuk*, 94 U.S. 324, 338 (1876):

> "[T]he public authority ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience."

Point II

Consistent with this purpose, ownership rights of the sovereign are confined to waterways which are navigable in fact.

The settled rule of law in the Court is that the 13 original states and all states subsequently admitted to the Union hold the absolute right to all their navigable waters and the soils under them. *Martin v. The Lessee of Waddell, supra,* 41 U.S. at 410; *Barney v. Keokuk, supra,* 94 U.S. at 329-337; *Illinois Central Railroad Company v. Illinois, supra,* 146 U.S. at 436; *Shively v. Bowlby,* 152 U.S. 1 (1893) (in which the Court conducts a "full review" of its prior decisions "upon the subject of public and private rights in lands below high water mark of navigable waters," Id., at 11); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra,* 429 U.S. at 373-374 (which held that the title acquired by the states to the beds of navigable waters within their boundaries could not be defeated either by "a provision in the Act admitting the State to the Union nor a grant from Congress to a third party," Id., at 374). "[T]he State's title to land underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself . . . [W]e are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional

sovereignty of the States." Id., at 374 and 381. The ownership of navigable waters and the soils under them within state boundaries is "an inseparable attribute of the political sovereignty guaranteed equally to all States . . ." *United States v. Louisiana,* 363 U.S. 1, 77 (1960). See *United States v. Texas,* 339 U.S. 707, 716 (1949).

This absolute right of each state in the Union of all of its navigable waters and the soils under them was not altered by The Submerged Lands Act, 43 *U.S.C.A.* 1301 *et seq.,* which was enacted on May 22, 1953. The Act merely confirmed the states' pre-existing rights in the beds of the navigable waterways within their boundaries by, in effect, quitclaiming all federal title thereto. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra,* 429 U.S. at 372, footnote 4. In explaining the purpose of the Act, it is said at 1 *Shore and Sea Boundaries* 118, Shalowitz, U.S. Department of Commerce, Coast and Geodetic Survey, Publication 10-1 (December 1978 reprint):

> "[I]t should be remembered that the basic consideration of the act is that the submerged lands must be under the *navigable* waters within its state boundaries."

In general, the states are at liberty to resign or convey their title to riparian proprietors, subject only to the paramount right of navigation over the waters. The Court observed in *Barney v. Keokuk, supra:*

> "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." 94 U.S. at 339.

Once title to the beds of navigable waterways is determined in the state at the time of its entry into the Union, the state's title is not subject to defeasance under any federal law concept, and state property law thereafter determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra,* 429 U.S. at 370-371 and 377-378. A limitation on unbridled state action in conveying lands under navigable waters, however, was provided in *Illinois Central Railroad Company v. Illinois, supra,* where the Court held that the Legislature of Illinois could not deprive the State of control over the bed and waters of the harbor of Chicago and place that control in the hands of a private corporation. In contrasting the title of the State to the beds of its navigable waterways with the title of the State to lands intended for sale, the Court noted that title to the former is "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." Id., at 452. This so-called "public trust doctrine" assures protection of the public rights of commerce, navigation, and fishing. Patently these public rights inhere in navigable waterways, and, just as certainly, they do not inhere in non-navigable interior meadowlands.

The definition of "navigability" which was formulated by the Court and has been followed generally in this country is found in *The Daniel Ball,* 77 U.S. 557, 563 (1870):

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as

> highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on waters."

An erroneous statement of the common law rule on navigable waters resulted in the admiralty jurisdiction of the United States being limited to tidal waters until 1851 when the Court decided *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S., 12 Howard 441. As explained in 78 Am. Jur. 2d §60, page 502 (Waters):

> "It has frequently been stated that at early common law navigable waters were those only in which the tide ebbed and flowed . . . This view as to the common-law rule apparently has for its foundation an erroneous declaration of Chancellor Kent in an early decision which he later carried into his Commentaries. The eminence of the author and the lack of original authorities led many courts in the early days to adopt it; but an examination of the English decisions and the works of the textwriters of the time leads to the conclusion that *the tidal test of navigability has never been the rule of English courts, but that rather the question has been determined with respect to actual usability for navigation*" (emphasis added).

See *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra*, 429 U.S. at 379; 2 *Shore and Sea Boundaries, supra*, at 520-521; 1 *Water and Water Rights* 109, Farnham, Lawyers Cooperative Publishing Company (1904). The differences in geography between England and the United States contributed to this erroneous view of the common law rule on navigable waters. In England:

> "[N]o waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as

said in the case of *The Genesee Chief v. Fitzhugh*, 53 U.S., 12 Howard 443, 445, 'tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;' and writers on the subject of admiralty jurisdiction 'took the ebb and flow of the tide at the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters.'" *Illinois Central Railroad Company v. Illinois, supra*, 146 U.S. at 435-436.

The true interest in England, as in the United States, has been to protect what are public navigable waters from private interruption and encroachment. Professor Henry Philip Farnham emphasizes that public rights are dependent on actual navigability:

> "A navigable body of water is one which the public has a right to use for the purposes of navigation. The term includes all waters which for a period long enough to be of commercial value are of sufficient capacity to float water craft for the purposes of commerce or to float to market the products of the country through which the water extends, so as to be useful to the population along its banks. *This is alike the rule of the civil, English common, and American law . . . The rights of the public are entirely dependent on the capacity of the stream for navigation.*" 1 *Water and Water Rights, supra*, at 100-102 (emphasis added).

Point III

"Tidal ebb and flow" under English common law and the law of New Jersey from colonial until modern times was a term of limitation of sovereign ownership within navigable waterways and was not a term of expansion of sovereign ownership into non-navigable areas.

To the extent that there is any confusion on the subject of sovereign ownership of land, it is attributable to the failure to distinguish "tidal ebb and flow" as a term of limitation of sovereign ownership within navigable waterways. It is essential to remember that in England, for all practical purposes, waterways are tidal to the head of navigation, and, accordingly, "navigability" and "tidal ebb and flow" are "synonymous terms". *The Propeller Genesee Chief v. Fitzhugh, supra,* 53 U.S., 12 Howard at 453. In the 13 original states there was no overriding need to distinguish between navigability and tidal ebb and flow because "the far greater part of the navigable waters are tide waters." Id., at 453. Public waterways, both in England and in this country, are avenues of transportation and commerce, and the capacity of a stream for navigation determines its public character. The term "tidal ebb and flow" became:

> ". . . the familiar mode of describing a public river . . . And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleadings, borrowed from England, the public character of the river was in process of time lost sight of . . . The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to

> and acted on, after it had ceased, from a change in circumstances, to be the true description of public water." Id., at 453-454.

In *The Propeller Genesee Chief v. Fitzhugh, supra,* the Court overruled its decisions in *The Thomas Jefferson,* 10 Wheaton 428 (1825), and *The Steamboat Orleans v. Phoebus,* 11 Peters 175 (1837), which had held that the admiralty jurisdiction of the United States was limited to waters in which the tide ebbed and flowed. In *Illinois Central Railroad Company v. Illinois, supra,* the Court held, in a case involving the dominion and sovereignty of the lakefront area of Chicago under the waters of Lake Michigan, that "[w]hen the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded." Id., at 436. Mr. Justice Field goes on to explain the basis of sovereign ownership at common law:

> "So also, by the common law, the doctrine of dominion over and ownership by the crown of lands within the realm under tide waters is not found upon the existence of the tide over the lands, but upon the fact that the waters are navigable . . ." Id., at 436.

Thus, sovereign ownership depends not on tidal ebb and flow but upon the use of the waters for navigation.

The classic language on this subject of sovereign ownership is found in the celebrated case of *The Royal Fishery of the Banne,* Davies, Rep. 149; Angell, *Tide Waters,* page 35 Appendix, which was decided in England in about the year 1604. This case classifies all waters into two categories: navigable and non-navigable:

> "There are two kinds of rivers; navigable and not navigable. *Every navigable river, so high as the sea*

> *flows and ebbs in it, is a royal river, and the fishery of it is a royal fishery, and belongs to the king by his prerogative; but in every other river not navigable, and in the fishery of such river, the ter-tenants on each side have an interest of common right.* The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows, *22 Ass. p. 93. 8 Ed. 2. Fitz. Coron. 399,* and the sea is not only under the dominion of the king (as is said *6 R. 2 Fitz. Protect. 46.* The sea is of the ligeance of the king as of his Crown of England;) but it is also his proper inheritance; and therefore the king shall have the land which is gained out of the sea, *Dyer 15 Eliz. 226.b. 22 Ass. p. 93* . . . And that the king hath the same prerogative and interest in the branches of the sea and navigable rivers, so high as the sea flows and ebbs in them, which he hath in *alto mari,* is manifest by several authorities and records." Angell, *Tide Waters,* pages 37-38, Appendix (emphasis added).

It is important to note that *The Banne* case held that the sovereign interest is limited to navigable waters in which the tide ebbs and flows and does not extend into non-navigable areas. This holding was carried into early American law.

Thus, in England "tidal ebb and flow" came into common usage as a convenient term for describing that country's public navigable waterways, a term which there was synonymous with the essential physical characteristic of navigability upon which all public rights totally depend. The English settlers of this country brought the term "tidal ebb and flow" with them, and, in general, it was applicable also to the public navigable waterways of

the 13 original states. It proved inapplicable, however, to the whole of the United States where many of our great interior rivers are navigable for hundreds of miles above the head of tide. When the Court discarded "tidal ebb and flow" as a term which was descriptive of this country's public waterways that are subject to federal admiralty jurisdiction and to sovereign ownership, it did not "create" a new and separate basis for sovereign ownership. It merely restated the test of sovereign ownership in terms of its true basis of "navigability" and thereby restored emphasis to the essential physical characteristic of the waterway upon which all public rights have been totally dependent since the time of Magna Charta in 1215. "Navigability" is a term of universal applicability in determining sovereign ownership while "tidal ebb and flow" is applicable only in limited circumstances such as existed in the small island nation in which the English common law originated and developed. Therefore, the New Jersey Supreme Court in its May 15, 1980 opinion in the *City of Newark* case is simply wrong when it states:

> "[I]n the nineteenth century the United States Supreme Court saw fit to create a navigability basis for sovereign ownership separate from the tidal test." 82 N.J. at 544.

The New Jersey Supreme Court rejects navigability as the criterion of sovereign ownership and sanctions a tidal ebb and flow test irrespective of navigability. It thereby falls into error.

In 1967 New Jersey's highest court for the first time abandoned "navigability" from the test of sovereign ownership and applied exclusively a "tidal ebb and flow" test to expand the state's ownership claims into vast areas of non-navigable interior meadowlands which historically have been the subject of private ownership.

O'Neill v. State Highway Department, supra. The traditional test of sovereign ownership used in New Jersey was a dual test of navigability and tidal ebb and flow, and from the earliest colonial settlement until the repeal of the Wharf Act of 1851 (Public Laws of 1851, page 335, Revised Laws of 1877, page 1240) the riparian owner even could obtain fee simple title to the lands between mean high and mean low water along navigable waterways by filling-in and reclaiming them. See *Martin v. The Lessee of Waddell, supra; Arnold v. Mundy,* 6 N.J.L. 1 (Sup. Ct. 1821), 10 A.D. 356; *Bell v. Gough,* 23 N.J.L. 624 (E. & A. 1852); *Glover v. Powell,* 10 N.J. Eq. 211 (Chan. 1854); *Stevens v. Paterson and Newark Railroad Company,* 34 N.J.L. 532 (E. & A. 1870), 3 A.R. 269; *Ross v. Mayor & Council of Edgewater,* 115 N.J.L. 477 (Sup. Ct. 1935), 180 A. 866, *affirmed,* 116 N.J.L. 447 (E. & A. 1936), 184 A. 810; Wharf Act, *supra,* and the repealers of the Wharf Act in Public Laws of 1869, chapter 383, paragraph 3, page 1018, and in Public Laws of 1891, chapter 124, page 216.

Whenever New Jersey's highest court directly addressed the sovereign ownership question before *O'Neill,* it did so in a factual context in which the mean high water line involved was that of a well-defined tidal waterway—a waterway with navigable capacity, *i.e.,* a public navigable waterway. Although *O'Neill* states that it "was resolved long ago" that the "State owns in fee simple all lands that are flowed by the tide up to the high-water line or mark", the two cases it cites as authority deal with lands that were clearly under navigable waters. *O'Neill v. State Highway Department, supra,* at 322-323. See also *Bailey v. Driscoll,* 34 N.J. Super. 228 (App. Div. 1955), 112 A.2d 3, *affirmed on procedural determinations, reversed on substantive issues and remanded with directions* 19 N.J. 363 (1955), 117 A.2d 265; *Schultz v. Wilson,* 44 N.J.

Super. 591 (App. Div. 1957), 131 A.2d 415, *certification denied* 24 N.J. 546 (1957), 133 A.2d 395. [Note: The State of New Jersey sometimes cites *Cobb v. Davenport*, 32 N.J.L. 369 (Sup. Ct. 1867), as authority for a sovereign ownership test of tidal ebb and flow irrespective of navigability. This case, however, involved Green's Pond in Morris County which is "a natural, inland, fresh water pond or lake, three miles long and one mile in width, and of sufficient depth to float large vessels." Id., at 377.] Apparently, the first instance in which a New Jersey court applied the sovereign ownership doctrine to interior meadowlands was in *Sisselman v. State Highway Department*, Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3782-58 P.W. (not officially reported), which was decided at trial on March 14, 1960, and on appeal in an unpublished opinion by the Appellate Division of the Superior Court on May 1, 1961 (A-769-59). The novelty and effect of the *Sisselman* case were described in the *Final Report of the New Jersey Commission to Study Meadowland Development* (Meyner Commission, chaired by former Governor Robert B. Meyner) (June 1965) (Ex. A-206) in these terms:

> "In 1960, the New Jersey courts were asked to consider whether two parcels in the Hackensack Meadows were in fact 'tidal.' In what has since become the celebrated *Sisselman* case, the courts found (on the evidence before them) that the subject parcels lay below mean high water and were flowed by the tides; although the land was tax assessed to private persons, their inability to produce a State grant in the chain of title deprived them of any ownership claim. *This was the first instance in which the New Jersey courts had applied (or had been asked to apply) tidal lands doctrine to an interior Meadowlands parcel.* One need hardly add that the *Sisselman* case has caused

> great consternation, for it has been read as meaning that many other titles to Meadowlands parcels might be affected with the same infirmity. To bear out this apprehension, in two subsequent decisions (where appeals still are pending), the courts found that other Meadowlands parcels also were 'tidal.'" (page 3) (emphasis added)

In summary, New Jersey's highest court has erroneously used "tidal ebb and flow" irrespective of navigability as the criterion of sovereign ownership and has lost sight of the fact that all public rights in waterways are entirely dependent on their navigability. The result is that New Jersey in the instant case wrongly asserts sovereign ownership to vast areas of interior meadowlands which are non-navigable.[2]

Point IV

Federal Constitutional principles relating to the domestic sovereignty of the States limit a State's sovereign ownership claims to the navigable waterways within its boundaries, and New Jersey today cannot lawfully expand its sovereign ownership claims into vast areas of non-navigable interior meadowlands.

The title claims of New Jersey to its inland waterways are an incident of domestic sovereignty as defined

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2. Sovereign ownership of New Jersey's non-navigable interior meadowlands is not justified by any concern for the protection of these environmentally-sensitive lands. In recent years New Jersey has developed an elaborate system of land use regulation in the coastal zone, including non-navigable interior meadowlands. This system prevents private land use decisions which would cause public harm. See, for example, the Hackensack Meadowlands Reclamation and Development Act (*N.J.S.A.* 13:17-1 et seq.), Coastal Wetlands Act (*N.J.S.A.* 13:9A-1 *et seq.*), and Coastal Area Facility Review Act (CAFRA) (*N.J.S.A.* 13:19-1 *et seq.*).

by federal constitutional principles and the decisions of the United States Supreme Court. *Martin v. The Lessee of Waddell, supra; Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra.* The 13 original states acquired the absolute right to their navigable waters and the soils under them at the time of the American Revolution and reserved those rights when they ratified the United States Constitution. *Martin v. The Lessee of Waddell, supra.* 41 U.S. at 410; *Pollard's Lessee v. Hagan, supra; United States v. California,* 332 U.S. 19, 31 (1947).

The parity between the 50 states of the Union as respects political standing and sovereignty is a federal constitutional requirement. The Court in *United States v. Texas, supra,* 339 U.S. at 719-720 explains the equality of the states in these words:

> "The 'equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (*Pollard's Lessee v. Hagan* (U.S.) 3 How 212, 11 L.Ed. 565, *supra*) which would produce inequality among the States. For equality of the States means that they are not 'less or greater or different in dignity or power.' See *Coyle v. Smith,* 221 U.S. 559, 566, 55 L.Ed. 853, 857, 31 S. Ct. 688."

The requirement of equal footing was designed:

> ". . . to create parity as respects political standing and sovereignty.
>
> "Yet the 'equal footing' clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the

Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves. (citations omitted). The theory of these decisions was aptly summarized by Mr. Justice Stone speaking for the Court in *United States v. Oregon,* 295 U.S. 1, 14, 79 L.Ed. 1267, 1273, 55 S. Ct. 610, as follows:

> 'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of lands to be held in private ownership or transfer of sovereignty itself. See Massachusetts v. New York, 271 U.S. 65, 89. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.' " *United States v. Texas, supra,* at 716-717.

The Court has held that "under Pollard's Lessee the State's title to land underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself . . . [W]e are not dealing with substantive property law as such, but rather with an issue substantially related

to the constitutional sovereignty of the States." *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra,* 429 U.S. at 374 and 381. Thus, a state's sovereign ownership claims are initially fixed at the time of its entry into the Union to the beds of the navigable waterways within its boundaries. State property law thereafter determines dispositions and the title consequences of any subsequent shifts or changes in the beds of the said navigable waterways. Id., at 370-371 and 377-378.

Although *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, supra,* involved a navigable waterway whose initial boundary line was fixed under the rule of *Pollard's Lessee* at the time of Oregon's admission into the Union, New Jersey's sovereign ownership claims likewise initially were fixed at the time of its entry into the Union to the beds of the navigable waterways within its boundaries, subject only to the federal navigational servitude. *Martin v. The Lessee of Waddell, supra,* 41 U.S. at 410. Subsequent dispositions and the title effects of subsequent shifts or changes in the beds of those navigable waterways are governed by New Jersey property law and not by any federal law concepts. However, New Jersey cannot under applicable federal constitutional principles lawfully expand its sovereign ownership into vast areas of non-navigable interior meadowlands which were not the subject of sovereign ownership at the time New Jersey ratified the United States Constitution. The opinion of the New Jersey Supreme Court, sanctioning such an expansion, must be reversed.

Point V

Additionally, New Jersey's retroactive expansion of its sovereign ownership claims into vast areas of non-navigable interior meadowlands constitutes the taking of private property without just compensation in violation of the Due Process Clause of the Fourteenth Amendment.

Pursuant to *N.J.S.A.* 13:1B-13.2, New Jersey has determined and certified its ownership of the Hackensack Meadows and the Newark/Elizabeth Meadows and filed its ownership maps in the land records of the affected counties. The New Jersey Supreme Court in its May 15, 1980 opinion in the *City of Newark* case gave final State court approval to this State action against a challenge mounted by the City of Newark, the City of Elizabeth, numerous record property owners whose lands have been determined and certified to be state owned, and the title insurance industry whose members have searched and insured as privately-owned much of the interior meadowlands shown on the filed maps to be within state ownership. New Jersey's action in determining and certifying vast areas of non-navigable interior meadowlands to be in State ownership constitutes a radical departure from the prior law of New Jersey on sovereign ownership and a radical departure from the State's administration of its riparian affairs from the time of the enactment of the Riparian Laws (*N.J.S.A.* 12:3-1 *et seq.*) in 1864 until the 1960s. While petitioners raised at all levels in the State court proceedings the issue of the violation of their federal constitutional rights under the Due Process Clause of the Fourteenth Amendment, this issue was never directly addressed below. See, particularly, 82 N.J. 536. Rather, the New Jersey Supreme Court opinion is worded in terms of laches and estoppel and the "mere failure" of the State to exercise

dominion over its property or "to give public notice of its properties." Id., at 545-546. It concludes:

> "In the absence of any showing that a State officer conscious of the State's interest stood by while the private owner acted in reliance thereon, *the State's failure to claim tidally-flowed, interior meadowlands until the passage of Title 13* does not support an estoppel" *Id.*, at 546 (emphasis added).

Even though the State of New Jersey may draw legal conclusions from the following facts which differ from petitioners' conclusions, the facts themselves are not in real dispute:

> (1) private record title to non-navigable interior meadowlands can be traced directly to the original English grant of March 12, 1664 from King Charles II to his brother, James, Duke of York (Ex. A-220; R-240).
>
> (2) on February 10, 1665 the Lords Proprietors, John Lord Berkeley and Sir George Carteret, issued their famous *Concessions and Agreement* which was formally known as *"The Concessions and Agreement of the Lords Proprietors of the Province of New Caesarea, or New Jersey, to and with all and every the Adventurers and all such as shall settle or plant there."* This document contains many of the political and religious rights which were subsequently incorporated into the United States Constitution. Item VII of the *Concessions and Agreement* provides:
>
> "That the inhabitants of the said Province have free passage thro' or by any seas, bounds, creeks, rivers or rivelets, &c. in the said Province, thro' or by

which they must necessarily pass to come from the main ocean to any part of the Province aforesaid." *The Grants, Concessions, and Original Constitutions Of The Province of New Jersey*, Aaron Leaming and Jacob Spicer, Second Edition, Honeyman & Company, Somerville, N.J., July 1881, at 25-26.

By force of Item VII of the *Concessions and Agreement* of the Lords Proprietors, since February 10, 1665 a public easement for passage has existed over the navigable waterways of New Jersey which may not be privately interrupted.

(3) from the earliest colonial settlement of New Jersey until the middle of the nineteenth century the sovereign authority never asserted that it had title to the land between mean high water mark and mean low water mark along navigable waterways, but "the owners of land bounding on navigable waters had an absolute right to wharf out and otherwise reclaim the land down to and even below low water, provided they did not thereby impede the paramount right of navigation." *Bell v. Gough, supra*, at 658 (Ex. A-203; A-220).

(4) non-navigable interior meadowlands have been routinely assessed and taxed to their private record owners to support governmental services (Tr. X-106; Ex. A-206; A-220).

(5) up until the late 1950s, the reported New Jersey cases which directly involved the issue of what lands New Jersey owned as an incident of state sovereignty applied the dual test of navigability and tidal ebb and flow to determine state ownership. See *Arnold v. Mundy, supra*, at 67; *Bell v. Gough, supra*,

at 656 and 658; *Stevens v. Paterson and Newark Railroad Company, supra*, at 533; *Ross v. Mayor & Council of Edgewater, supra*, at 483-484 (Ex. A-173 to 175; A-203; A-205; A-299).

(6) the unreported decision in *Sisselman v. State Highway Department, supra*, in 1960 was "the first instance in which the New Jersey courts had applied (or had been asked to apply) tidal lands doctrine to an interior meadowlands parcel." See *Final Report of the New Jersey Commission to Study Meadowland Development* (Meyner Commission, chaired by former Governor Robert B. Meyner) (June 1965) at 3 (Tr. X-99; XII-93; Ex. A-206).

(7) from at least 1869 until the 1960s the State of New Jersey has been issuing riparian grants based on a mean high water line as an essential constituent of the legal description of the lands being conveyed, and, in many instances, the State's ownership claims on the maps filed pursuant to *N.J.S.A.* 13:1B-13.1 *et seq.* include vast areas of non-navigable meadowlands which lie interior of the mean high water line upon which the said riparian grants are based, *e.g.*, there is a virtual continuous series of riparian grants along Newark Bay and the lower Hackensack and Passaic Rivers. On the maps filed by the State under *N.J.S.A.* 13:13B-13.1 *et seq.* New Jersey has determined and certified its ownership to vast areas which lie interior of the mean high water line upon which the various riparian grants are based (Tr. X-99 to 129; XI-45 and 46; XII-93; Ex. A-33 to 53; A-173 to A-175; A-242; A-252 to 254; A-299; R-1 to 72).

(8) the riparian grants which New Jersey has issued from at least 1869 until the 1960s have been executed for the State by the Governor of New Jersey,

the Attorney General of New Jersey, and the Chairman of the State's riparian agency (Ex. A-252 to 254).

(9) the record includes the sworn testimony of the late Peter J. Gannon, Chief of the New Jersey Bureau of Navigation, and the late Fred C. Freeman, Supervisor of Grants and Leases in the Bureau of Navigation (Tr. X-56 to 64, 78 to 90, and 99 to 106; Ex. A-173 to 175 and A-299); these two senior staff officials of the State's riparian agency testified concerning the operations of the Bureau of Navigation from 1924 until 1969. Both of them testified that during this period from the 1920s to the 1960s New Jersey never asserted ownership to the non-navigable interior meadowlands and, in fact, handled all inquiries by indicating that New Jersey had no claim of ownership to interior meadowlands. These two men were in charge of the staff of the State's riparian agency during most of this century, and they indicated in their testimony that the riparian agency itself, as well as the Office of the Attorney General of New Jersey, were aware of the staff's position that the State did not own non-navigable interior meadowlands and the riparian agency and the Attorney General's Office concurred with this view (Tr. X-61 to 90; X-99 to 129; XI-45 and 46; XII-93; Ex. A-33 to 53; A-173 to 175; A-242; A-299; R-1 to 72).

(10) On September 26, 1961 the Bureau of Navigation issued Directive No. 103 which contains the following statements with regard to the State's ownership claims:

"The Navigation Bureau does not claim any interest on behalf of the State in any lands unless atlas sheets, maps, aerial photos, or other records in our

> office show that *such lands front on or are crossed by waterways* now or formerly flowed by tide water and, if so, then *the Navigation Bureau only makes claim on behalf of the State to the extent of the frontages on said waterways and to the extent of the present or former flow of tidal waters in said waterways* as shown on atlas sheets, maps, aerial photos or other records in this office." (Ex. A-188) (emphasis added).

Under the Due Process Clause of the Fourteenth Amendment, petitioners are entitled to be protected from the unlawful and arbitrary deprivation of their property by the State through State action, whether legislative, administrative, or judicial in nature, which amounts to a taking of that property for public use without just compensation. Petitioners asserted before the State courts and assert here that the rationale of Mr. Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 294 (1967) should be applied in the instant case. Property which for 300 years had universally been considered to be the subject of private ownership was suddenly declared by State action to be publicy-owned. Nothing in the law of New Jersey on this subject nor in the administration by the State of its riparian affairs would provide a precedent for the State action here under challenge. The determination and certification by the State that vast areas of non-navigable interior meadowlands are state owned was clearly unpredictable in terms of any of the relevant precedents. To the extent that New Jersey's action in expanding its sovereign ownership claims into vast areas of non-navigable interior meadowlands "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," it violates the Due Process Clause prohibition against the taking of private property without just compensation. *Id.*, at 296.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

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